savings clause jurisprudence: "We believe that our use of the McCarran-Ferguson case law in the ERISA context has misdirected attention, failed to provide clear guidance to lower federal courts, and, as this case demonstrates, added little to the relevant analysis." *Kentucky Ass'n*, *supra*, at 339-40 (2003). The *Levine* opinion below destabilizes rather than streamlines savings clause standards within the Third Circuit. The decision below identified three discreet reasons for preempting the New Jersey Rule. First, the *Levine* decision found that the New Jersey Rule is one that regulates entities other than insurance companies. *Levine*, *supra*, at 165. Second, the Third Circuit maintained that the "driving intent" of the New Jersey Rule was not with respect to insurance companies but, rather, to any litigant irrespective of the presence of insurance. *Id.* Third, the Court read the "plain language" of the state statute to support its conclusion that the New Jersey Rule is one of general application. *Id.* at 165-66. In support of these three findings, the *Levine* Bench made a number of ancillary observations worth highlighting. It acknowledged that "the legislative history and the *Perreira* decision do indicate an intent to lighten the burden on the liability insurance industry. . . ." *Id.* at 165 (*referencing Perreira v. Rediger*, 778 A.2d 429 (NJ, 2001) (*italics original*). The Third Circuit also did not appear to dispute that the New Jersey Rule is "aimed at" the business of insurance. *Levine*, *supra*, at 166 (*citing FMC Corp. v. Holliday*, 498 U.S. 52 (1990)). The Court relied upon but misapplied the clear guidance supplied in *Kentucky Ass'n*.

The purpose of this Court's decision in *Kentucky Ass'n* was to harmonize savings clause jurisprudence. *Kentucky Ass'n*, *id.*, at 340. In so doing, the Court

appears to have replaced the McCarran-Ferguson test and adopted a two-factor test as influenced by the McCarran-Ferguson factors. *Kentucky Ass'n, supra*, at 341. These factors are credited as "considerations [to be] weighed" *(Kentucky Ass'n, supra*, at 341 *(quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 742-43 (1985)), "checking points" (*Kentucky Ass'n, id. (quoting UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 374 (1999)), and "guidepost[s]". *Kentucky Ass'n, id.(quoting Rush Prudential HMO v. Moran*, 536 U.S. 355, 373 (2002)). This Court has also credited a savings clause determination based upon "common sense". *UNUM, id.*

The Third Circuit's holding below denigrated from the *Kentucky Ass'n* holding. First, it disregarded New Jersey court decisions, including two from its Supreme Court, that squarely held that the New Jersey Rule is aimed at insurance entities. *See Fayer v. Keene Corp.*, 709 A.2d 808 (N.J. App. Div., 1998); *Kiss v. Jacob*, 650 A.2d 336 (N.J., 1994); *Lusby v. Hitchner*, 642 A.2d 1055 (N.J. App. Div., 1994); *Parker v. Esposito*, 677 A.2d 1159 (N.J. App. Div., 1996); *and Perreira, supra*. The *Levine* Court observed, finally, that the New Jersey Rule did not possess the "driving intent" necessary to ward off preemption but, nonetheless, was admittedly "aimed at" insurance companies. *Levine, supra*, at 165, 166. This holding denigrated from savings clause jurisprudence by relying upon the ancillary effects of the state law at issue rather than its overriding purpose. *Kentucky Ass'n, supra*, at 342 ("First, the state law must be specifically directed toward entities engaged in insurance."). In this sense, the Third Circuit's finding as to the purpose of the New Jersey Rule is difficult to discern, especially since the

Court had access to a sizable body of state court decisions finding in the alternative.

The standards set out in *Kentucky Ass'n* represent an innovative yet practical template for resolving savings clause disputes. Of especial importance in the field of employee benefits, subordinate courts hearing ERISA matters should be advised not to stray from the two-part test and associated guidance provided in *Kentucky Ass'n*. Accordingly, this Court is presented with an opportunity to firmly remind the subordinate federal courts not to adopt radical approaches to the interpretative standard mandated by the two-part test.

POINT III

THE THIRD CIRCUIT'S DECISION BELOW PERMITS FULLY-INSURED ERISA PLANS TO REAP THE BENEFIT OF COLLECTING INSURANCE PREMIUMS WITHOUT PROVIDING COVERAGE.

ERISA contains many of the participant-protective features existing at the common law of trusts. *Bruch, supra*, at 110 (*"ERISA abounds with the language and terminology of trust law."*). ERISA jurisprudence, moreover, has recognized the beneficient purposes of the statute as geared "'to promote the interests of employees and their beneficiaries in employee benefit plans' . . . 'and to protect contractually defined benefits.'" *Bruch, id.*, at 113 (*quoting, respectively, Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), *and Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985)). Indeed, a savings clause holding which does not take

into account the overriding policy goals of ERISA is disfavored:

> In the present case, moreover, we are obliged in interpreting the savings clause to consider not only the factors by which we were guided in Metropolitan Life, but also the role of the savings clause in ERISA as a whole. On numerous occasions we have noted that ""**in expounding a statute, we must not be guided by a single sentence or member of a a sentence, but look to the provisions of the whole law, and to its object and policy.**""

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41, 51 (1987)(*emphasis supplied*)(*quoting Kelly v. Robinson, 479 U.S. 36, 43 (1986), quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (1986) (quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956) (in turn quoting United States v. Heirs of Boisdore*, 8 How. 113, 122 (1849))).

The decision below created an anomalous result in that individuals who participate in ERISA plans have fewer protections than non-ERISA consumers who purchase individual health insurance policies. Insurance carriers providing indemnification with respect to ERISA plans are permitted to retain premium payments and, at the same time, evade coverage obligations. The purchase of an individual (non-ERISA) health insurance policy, on the other hand, affords the individual purchaser the benefit of the New Jersey Rule. As noted by one commentator:

> . . . [I]f an insurer is allowed to subrogate and recover the money it paid its insured on the claim, then it finds itself in the position of having suffered no loss. Additionally, the insurer retains the premium initially charged to cover that risk.[] By virtue of this analysis, it appears as though the insurer receives a pure windfall,[] at least on those claims where there is a tortfeasor or other third party liable for the injuries sustained by the insured.

Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D.L.Rev. 237, 243 (1996)(*internal footnotes removed*).

Concerns of fairness have permeated ERISA jurisprudence as reflected in this Court's 1984 decision in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984). Fairness has guided this Court in determining rights and responsibilities in the context of ERISA. As noted by the *R.A. Gray* Court's dissent, "[i]ndeed, if one looks beyond the administrative burden, one finds that Washington's statute poses no obstacle, but furthers ERISA's ultimate objective -- **developing a fair system for protecting employee benefits**." *Egelhoff v. Egelhoff*, 532 U.S. 141, 158, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001) (Breyer, J., *dissenting*)(*citing R.A. Gray, id.*)(*emphasis supplied*). The *Egelhoff* dissent goes on to state:

> David did not change the beneficiary designation in the pension plan or life insurance plan during the 6-month period between his divorce and his death. As a result, Donna will now receive a windfall of approximately $80,000 at the expense

> of David's children. **The State of Washington enacted a statute to prevent precisely this kind of unfair result.** But the Court, relying on an inconsequential administrative burden, concludes that Congress required it.

Egelhoff, *id.*, at 159 (*emphasis supplied*).

Concerns of fairness, as expressed by the Supreme Court, are not limited to Title I of ERISA: "In sum, as in *Connolly*, the employer 'voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA,' making the burden the MPPAA imposed upon it **neither unfair nor unjust**." *E. Enters. v. Apfel*, 524 U.S. 498, 528, (*citing Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 646, 124 L.Ed.2d 539, 113 S.Ct. 2264 (1993) (*referencing Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) *and the Multiemployer Pension Plan Amendment Act of 1980, 94 Stat. 1208*)(*italics original; bold-faced type supplied*).

An obvious unfairness to participants frustrates the bedrock purposes of the ERISA law: "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983) *citing Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980) & *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Of note, preemption caselaw includes observations of the rank unfairness sometimes experienced by ERISA participants: "In practice, however, nothing has been further from the truth -- ERISA generally, and §514(a) particularly, have become virtually impenetrable

shields that insulate plan sponsors from any meaningful liability for negligent or malfeasant acts committed against plan beneficiaries in all too many cases." *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442,456 (3d.Cir, 2003) *(unpublished)* (Becker, C.J., *concurrence*). The concerns expressed in *DiFelice* are founded upon jurisprudence out-of-accord with the participant-friendly purposes of ERISA.

An anomaly of this nature – ERISA participants having **fewer** protections as a result of ERISA – has been cogently rejected by the U.S. Supreme Court: "Adopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Bruch, supra*, at 113-114. Moreover, this Court has made legal-policy decisions based upon ERISA's concern for well being of individuals who depend upon such plans:

> ERISA's solicitude for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in the survivor's annuity. Even a plan participant cannot defeat a nonparticipant surviving spouse's statutory entitlement to an annuity. It would be odd, to say the least, if Congress permitted a predeceasing nonparticipant spouse to do so. Nothing in the language of ERISA supports concluding that Congress made such an inexplicable decision. . . . Perhaps even more troubling, the recipient of the testamentary transfer need not be a family member. For instance, a surviving spouse's § 1055 annuity might be substantially reduced so

> that funds could be diverted to support an unrelated stranger.

Boggs v. Boggs, 520 U.S. 833, 843-44 (1997).

The Third Circuit's decision in *Levine* provides no constructive policy contributions to the body of savings clause law. Rather, the holding places ERISA participants in a less-favorable position than non-ERISA health-insurance consumers. Accordingly, the Court's holding below frustrates the equitable, participant-protective purposes of ERISA.

POINT IV

THE DECISION BELOW IMPERMISSIBLY INVADES THE TRADITIONAL SPHERES OF STATE REGULATORY POWERS

Judge Garth's dissent below recognizes New Jersey's right to design and interpret its own insurance law: "Contrary to the majority, I conclude that our understanding of the New Jersey collateral source statute must be informed by the New Jersey Supreme Court's interpretation." *Levine, supra*, at 171. The dissent's respect for New Jersey's sovereignty comports with ERISA's preservation of state authority with respect to securities, banking, and insurance. The decision in *Travelers* specifically incorporates this Court's acknowledgement of traditional spheres of state authority even in the context of ERISA:

> And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have

> addressed claims of pre-emption with the starting presumption that **Congress does not intend to supplant state law** . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Travelers, supra, at 654-55 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(*emphasis supplied*)(*internal cites omitted*); *see also Alessi, supra,* at 522 (*confirming this Court's "respect for the separate spheres of governmental authority preserved in our federalist system."*).

The Third Circuit's decision below impedes the State of New Jersey's legitimate right to design its own insurance law. The *Levine* decision stands contrary to statements of New Jersey's Supreme Court in interpreting its own law. The "presumption against pre-emption" (*Travelers, id.*, at 655.), when considered with the overriding purposes of ERISA and its savings clause, indicates the Third Circuit's impermissible encroachment upon an area specifically reserved to the states under ERISA. Supplanting federal law in an area where the individual states have particular authority creates the risk of misinterpretation of the state law. *Levine's* dissent identifies this risk and states:

> While the Supreme Court has held that "laws of general application that have some bearing on

> insurers do not quality," . . . the New Jersey collateral source statute presents the inverse proposition -- it is a law specifically directed towards the insurance industry that has some bearing on non-insurers. As such, it "homes [sic] in on the insurance industry and does 'not just have an impact on [that] industry'." . . . Because the New Jersey statute had its genesis in specific legislative action, as opposed to general principles of tort or contract law, the majority opinion's reliance on Pilot Life is entirely misplaced.

Levine, supra, at 170 (*internal cites removed*)(*brackets original*)(*quoting Miller, supra*, at 334, *UNUM, infra*, at 368, and *Pilot Life, supra*, at 50).

The savings clause specifies clearly that the fields of banking, securities and insurance are saved from federal ERISA preemption. 29 U.S.C. § 1144(b)(2)(A). This Court upheld state insurance authority, in fact, even while acknowledging that such sovereignty "creates disuniformities . . . " for ERISA plans purchasing insurance. *UNUM v. Ward*, 526 U.S. 358, 376 (fn 6)(1999). Judge Becker's dissent below reflects (although on a variant issue) concern for the right of New Jersey to speak of its own insurance law:

> As a result, I believe that the proper course for this Court to take would be to certify the issue of retroactivity to the New Jersey Supreme Court.

Levine, supra, at 171.

While this Court made a "clean break" with the components of the prior savings clause test, it still preserved the preservationist theme of the McCarran-Ferguson Act. *Kentucky Ass'n, supra*, at 341 (*crediting the value of the McCarran-Ferguson factors in guiding savings clause analysis) (internal cites removed*). Regulatory guidance reaffirms the solid authority of the individual states to regulate insurance:

> By providing that only State insurance law that does not prevent the application of the regulatory standards will be saved from preemption, subparagraph (k)(1) preservers the procedural protections required by the regulation, which the Department finds essential to the full and fair review mandated by section 503 of the act, **but recognizes that States may impose non-conflicting standards for internal processes.**

65 F.R. 70246, 70254 (Nov. 21, 2000)("*Preemption of State Law*") (*emphasis supplied*).

Preemption standards reflecting the autonomy of the individual states are mandated by ERISA. The Third Circuit's decision in Levine interferes with the manner in which New Jersey has chosen to deliver an insurance law to its regulated community. Sound policy is reflected in savings clause decisions which contribute to rather than subtract from state autonomy.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit in *Levine* destabilizes

savings clause standards, places ERISA participants in a position less favorable than non-ERISA insurance consumers, and interferes with New Jersey's right to frame its own insurance law. This matter represents an opportunity for this Court to settle an area of law which, until recently, was admittedly chaotic and roiling.

Respectfully submitted,

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